

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

-v-

Case No. 17-cr-20183

DARRICK DERNARD BELL,

Defendant.

_____/

SENTENCING HEARING, VOLUME 1

BEFORE THE HONORABLE MARK A. GOLDSMITH

Detroit, Michigan, Monday, April 1st, 2024.

APPEARANCES:

FOR THE PLAINTIFF:

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WITNESSES:

NONE

EXHIBITS

(Identified)

(Admitted)

NONE

1 Detroit, Michigan.

2 Monday, April 1st, 2024.

3 At or about 2:56 p.m.

4 -- --- --

5 THE CLERK OF THE COURT: Please rise. The United
6 States District Court for the Eastern District of Michigan is
7 now in session, the Honorable Mark Goldsmith presiding. You
8 may be seated.

9 The Court calls case number 17-20183, the United
10 States of America versus Darrick Bell. Counsel, please place
11 your appearance on the record.

12 MR. ROTH: Good afternoon, your Honor. Matthew Roth,
13 Lisandra Fernandez-Silber and Blake Hatlem on behalf of the
14 United States.

15 MR. AMBERG: And good afternoon, your Honor. It's
16 great to see you. Jim Amberg on behalf of Mr. Bell. He's
17 sitting to my left.

18 THE COURT: All right. Good afternoon. All right,
19 this is the date and time set for the sentencing. Are the
20 parties ready to proceed?

21 MR. ROTH: Yes, your Honor.

22 MR. AMBERG: Yes, Judge.

23 THE COURT: Have the attorneys gone over the
24 presentence investigation report?

25 MR. ROTH: Yes, your Honor.

1 MR. AMBERG: Yes, your Honor. I've had a chance to
2 go over it with my client. We've had a number of objections
3 that we made to probation. You can see that sort of boiling
4 into why we're here today or part of it, but I have had a
5 chance to review it with my client.

6 THE COURT: All right. I know there are objections
7 and I want to go over them with you. The first question I had
8 had to do with the criminal history. There's a contention by
9 the defense that certain convictions don't satisfy the 15-year
10 requirement and in looking at the presentence investigation
11 report, there's no government specific explanation about how
12 the 15-year requirement is satisfied. It relies on the
13 probation department's response which talks in general terms
14 that quote "due to the defendant's continuous parole
15 violations, absconding and escape, he did not complete any of
16 the sentences being objected to until he entered the 15-year
17 period prior to the instant offense." Now the government's
18 sentencing memorandum doesn't go into any greater detail about
19 that, so I'm trying to understand how the 15-year requirement
20 actually has been satisfied in the government's view.

21 I did have a conversation with probation ahead of
22 time to try to understand better what information probation has
23 and I did receive a sheet of information that appears to be
24 something from the Michigan Department of Corrections. Just
25 one moment.

1 (Pause)

2 THE COURT: All right. Were' back on the record.
3 Mr. Roth?

4 MR. ROTH: Your Honor, would you want me to stay at
5 counsel table?

6 THE COURT: You can speak anywhere where there's a
7 microphone. You can remain seated there or you can come to the
8 podium. It's your choice.

9 MR. ROTH: Okay. Thank you, Judge. Your Honor, I've
10 had an opportunity to talk to probation as well about this
11 issue and the records that they have from the Michigan
12 Department of Corrections indicate that the defendant was on
13 parole through the period to which he's released in 2013; shows
14 that he was incarcerated up to that time as well. I don't
15 think that we're going to get exceptionally detailed records in
16 talking with the probation department, but the records are
17 consistent with respect to those underlying charges that the
18 defendant is claiming should not be counted. The defendant's
19 argument is that if you add up all the days, it exceeds the
20 statutory maximum of the offense, but I don't know that the
21 methodology to which the defense used to come up with that
22 calculation is how Michigan Department of Corrections views it
23 and I think we have to defer to the Department of Corrections'
24 records which indicate that he was incarcerated up until 2013
25 and that he was, still had those offenses, were active in their

1 system until they were discharged upon his release. So those
2 records tell us that he was still under the sentencing of
3 those. It could be that the Department of Corrections did some
4 consecutive sentencing given the fact that he had pending
5 matters and picked up a new case. It could be that they
6 stacked it. The records don't give us that specificity, but it
7 does show he was still under sentence on those offenses as I
8 understand them up and through 2013.

9 THE COURT: Well, Mr. Amberg?

10 MR. AMBERG: Yes, your Honor.

11 THE COURT: Go ahead.

12 MR. AMBERG: And I did a very detailed calculation in
13 my sentencing memorandum that reflects what I think is
14 happening here which is that the crimes that are listed as,
15 umm, you know, all these various crimes that Mr. Bell has in
16 his past, the maximum amounts of time you can get for each
17 crime was done while he was in prison, but I think what's going
18 on is this, is that he gets the second degree murder conviction
19 back in the '90s and so he gets a much bigger sentence for that
20 case and now he's in prison on that and all these other cases
21 just sort of get latched onto the big case and I don't know why
22 MDOC wouldn't just say he's finished the sentences on all the
23 other cases because he certainly did. It would be impossible
24 to put him on parole; he did his maximum amount of time on each
25 one of those sentences. There's no evidence that this was

1 consecutive and I think that, umm, it would be my experience
2 having done a lot of cases in the state sentence that I would
3 be shocked if it was consecutive.

4 THE COURT: Well, wasn't he on parole at the time of
5 the 1996 conviction for the second degree murder?

6 MR. AMBERG: I believe so.

7 THE COURT: All right. Well, would that not have
8 suspended the running of the parole sentence at that time?

9 MR. AMBERG: I think he would have completed it.

10 THE COURT: Why would he have completed it? Why
11 would a conviction mean you've completed your parole sentence?

12 MR. AMBERG: Well, no, no, when he's back in custody,
13 when he's back in MDOC.

14 THE COURT: That's if it's going to continue to run
15 and be concurrent, but if it's suspended, then wouldn't that
16 explain perhaps -- well, I don't know. The record I have shows
17 that it was done in 2003, that the sentence for one of these
18 underlying offenses, prior offenses was done in 2003 or '2?
19 Maybe probation could explain. What is the significance -- do
20 the attorneys have this document from MDOC?

21 MR. AMBERG: I don't, your Honor.

22 THE COURT: All right.

23 PROBATION OFFICER LUKE: Your Honor, if I may, so the
24 document that I provided the Court prior to the sentence is a
25 printout from Mr. Bell's MDOC record. That was provided by the

1 MDOC to the probation department. Two of the offenses are
2 highlighted on that sheet of paper including the offenses
3 listed in paragraphs 40 and 41 of the presentence report and
4 highlighted for your Honor are the new maximum dates of custody
5 based on his parole violations and the sentences imposed on
6 those parole violations. So that paper shows that at this time
7 on, umm, when he was returned as a parole violator with new
8 sentence which appears for the second degree murder charge, he
9 had parole violations and was given sentences of, umm, that
10 moved his release date out to 2000, the earliest 2002 and the
11 latest, 2003. Additionally, records obtained by the probation
12 department in his criminal history record check show that none
13 of these cases that the defense counsel is referencing were
14 closed out until 2015 so those sentences were still open upon
15 his release from custody for the second degree murder charge.

16 THE COURT: Well, first of all do you have anymore
17 copies of this?

18 PROBATION OFFICER LUKE: I do, your Honor.

19 THE COURT: All right. Let's give one to Mr. Amberg
20 and to the government as well. So are you saying that this
21 sheet of paper reflects the convictions from paragraphs 40 and
22 41?

23 PROBATION OFFICER LUKE: Yes, your Honor. The packet
24 of information provided by the MDOC, umm, it didn't appear to
25 have a similar piece of paper for paragraph 39, however it

1 would be the view of the probation department that the same,
2 umm, policy or procedure would have been enacted for the
3 offense in paragraph 39 based on the time frame in which he was
4 returned to custody and that offense was also dealt with by the
5 MDOC after he had escaped from the MDOC work camp or prison
6 camp.

7 THE COURT: All right. So something on this piece of
8 paper says that the sentences for these two other convictions
9 ended in either 2002 or 2003?

10 PROBATION OFFICER LUKE: Those were the new maximum
11 custodial dates based on the parole violations.

12 THE COURT: All right, where on the document should I
13 look to see that?

14 PROBATION OFFICER LUKE: I think I highlight them,
15 highlighted those --

16 THE COURT: Is it the one at the bottom or the one in
17 the middle?

18 PROBATION OFFICER LUKE: The one at the bottom, your
19 Honor, is for paragraph 40 of the presentence report and then
20 in the chart is for paragraph 41.

21 THE COURT: All right. So what would explain the
22 sentences maxing out in 2002 and 2003? Would that mean that
23 the parole sentences continued to run notwithstanding the 1996
24 conviction?

25 PROBATION OFFICER LUKE: I think that it would be my

1 opinion and, umm, that during the time that the defendant
2 absconded from parole and escaped from the MDOC camp, his time
3 no longer was being credited towards his sentence, so during
4 that time he wasn't serving his custodial time any longer.
5 When he returned on the new, umm, the new charge he was also
6 given additional time for violating and absconding from parole
7 which is reflected on that sheet as well your Honor at least
8 for paragraph 40 which is at the bottom of the page.

9 There should be three separate parole violation
10 sentences that were imposed on each count one, two and three of
11 the conviction at that time. So I believe that that time was
12 added on to and served from the time he was incarcerated and
13 then those new dates were made based on that additional ordered
14 time.

15 THE COURT: All right. So the sentences stopped
16 running during the time that he escaped until he was
17 apprehended. Is that right?

18 PROBATION OFFICER LUKE: That would be my
19 understanding.

20 THE COURT: And how long a time period was that?

21 PROBATION OFFICER LUKE: It appears to be about six
22 months, your Honor, little over six months, but he also did
23 abscond earlier and during his parole from '92 for almost,
24 almost a year, so around 11 months. So during that time, he
25 also, the clock kind of stopped on his sentence.

1 THE COURT: So it stopped for 11 months initially,
2 stopped for six months the second time?

3 PROBATION OFFICER LUKE: That would be my
4 understanding.

5 THE COURT: All right. So 17 months. Okay. In any
6 case these sentences are according to this for paragraph 40,
7 for the paragraph 40 conviction, it would have ended in 2003,
8 is what you're saying or 2002 for one of the counts?

9 PROBATION OFFICER LUKE: I believe because the
10 sentence imposed on the probation violation is a range, I
11 believe that the first 2002 date would be the minimum of that
12 proposed sentence and then the maximum would be the 2003 date.

13 THE COURT: Now what about the sentences for the
14 other convictions? Do you have any paperwork at all on that?

15 PROBATION OFFICER LUKE: I don't, your Honor. Umm,
16 it, it -- I could not find it in the packet that was provided
17 by the MDOC. I know for the paragraph 39 conviction,
18 substantially older so I don't know if that had anything to do
19 with it, but it did not appear that that same information was
20 included in the packet provided.

21 THE COURT: So you have nothing for 38 as well?

22 PROBATION OFFICER LUKE: No, your Honor.

23 THE COURT: All right. So is it possible MDOC has
24 records, they just for some reason didn't include them in the
25 packet they sent to you?

1 PROBATION OFFICER LUKE: I'm not sure, your Honor. I
2 would have to double check with them. The packet provided was
3 pretty large so I'm guessing that they provided all that they
4 had in regards to Mr. Bell, but I can't be for certain if that
5 document exists.

6 THE COURT: All right. Mr. Amberg, do you want to
7 respond to any of that?

8 MR. AMBERG: Your Honor, I find it -- you know, when
9 I wrote the memorandum, I very specifically showed when he was
10 in and when he was out and I just find it hard to believe that
11 there is some sort of mechanism that allows for somebody to
12 serve past their maximum amount of time and --

13 THE COURT: Well, wouldn't that mechanism be
14 escaping? You wouldn't be getting credit for when you have
15 absconded, right?

16 MR. AMBERG: Oh, I agree, your Honor. That's why
17 when you look at my memorandum, I take those times out. I only
18 included the times that he actually was in custody, so when you
19 look at that, all of these cases are complete -- the maximums
20 are completed long before the 15 years and however MDOC did it,
21 I mean, I can see something falling through the cracks because
22 Mr. Bell has a separate second degree murder conviction that is
23 a much more significant case that's carrying over into the new
24 millennia, so maybe that was a typo, I don't know, but it
25 doesn't make sense to me that you could serve more than your

1 maximum amount of time in prison. I mean, it doesn't look like
2 he gives a habitual offender on here, I don't see anything like
3 that. I mean, he did his maximum time in each one of those
4 cases long before he was ever paroled.

5 THE COURT: Do you have both periods of escape here
6 accounted for?

7 MR. AMBERG: I have, umm, let's see, 1990 to, umm, he
8 served time 7-18-1990 to 1-29-1992. Then he's out. Then he's
9 back in 10-6-93 to 5-16-1994 and then finally 11-29-1994 is
10 when he then goes in and that's, he's in until he's done
11 serving the incarceration portion of his second degree murder
12 case.

13 THE COURT: So you have one escape period accounted
14 for, right?

15 MR. AMBERG: I believe so. I thought I had two. I
16 had the 7-18-1990 to 1992 he does 560 days. Then he's either
17 released or escapes. Then from October 6th of '93 to 1994,
18 he's in. Then he's released again, whether that's escape or
19 whatever it is, he's not serving time and then from 5-16 of
20 1994 to 11-29-1994, those days don't count, but then after
21 11-29-1994, that's when he starts again so I've got both those
22 times there reflective in my memorandum that he's out. So even
23 with both, you take away those days, the 15 year for all these
24 cases is well served before the 15-year period and I mean, I
25 don't know what nuances MDOC may have, but I think if I were to

1 challenge that and say hey look, you can't give somebody parole
2 who's done their maximum sentence, I don't think I could find a
3 judge out there that wouldn't agree with me on that. Unless
4 there was some sort of different case that he had that stopped
5 all of that and I don't -- I'm not aware of anything in the
6 state system that would do that. It looks like they just
7 brought him back in and he finished his sentence on all these
8 and then he just did more time on his second degree murder
9 sentence.

10 THE COURT: All right. Mr. Roth?

11 MR. ROTH: Your Honor, Mr. Amberg's argument is
12 premised on the fact that counting actual days of incarceration
13 is the way that you determine whether or not these sentences
14 have been, that the time was allocated to those sentences. As
15 a punishment for absconding not only once and then escaping,
16 but twice really, they may have decided not to give him credit
17 toward all the sentences that he was, that he had going against
18 him.

19 The record shows us that they have, whatever
20 decision-making process that they engaged in, he was carried
21 over pass 2000 which is really what we're looking at because
22 we're going 15 years back from when the Victory Inn started.
23 So Mr. Amberg doesn't have -- he's simply counting the days he
24 was in and that's assuming MDOC allocated those days to all of
25 these prior convictions.

1 When he picked up the second degree murder after
2 escaping once and absconding another time, they may have
3 stripped him of some of the good time. They may have decided
4 that he was going to serve on the murder case for a certain
5 amount of time before getting credit on the other offenses.
6 We're, we're kind of arguing against Mr. Amberg's argument
7 without any supporting documentation when we have a
8 documentation from the Department of Corrections that shows us
9 that it goes past that 2000 threshold.

10 MR. AMBERG: If I could just briefly respond to that,
11 your Honor, because I know we're all, Mr. Roth, myself, your
12 Honor as well, we're all experienced in the state's criminal
13 system. I am under -- I have no knowledge of any mechanism in
14 which the MDOC could add time. I think that's sort of stepping
15 into the province of the judge because the courts would, like
16 the sentencing judge in each one of these cases has a decision
17 to make that sometimes they could run it consecutively,
18 sometimes they can run it concurrently, but I don't think an
19 escape would then give the MDOC the ability to then change a
20 sentence because that's what it would have to be.

21 MR. ROTH: Well, I'm not implying that they changed
22 the sentence, I'm implying that where do they allocate the
23 credit for time served? Are they going to give him credit for
24 time served on all four of these offenses after he absconded,
25 after escaped and then after he picks up a second degree

1 murder? I think that the MDOC has the discretion and I don't
2 know this, but it makes sense that when somebody has done what
3 he did with four pending cases, that they may say we're going
4 to take away good time, we're going to let you serve some now
5 and then some later or they're going to extend when they're
6 going to grant parole. It's certainly within their discretion.

7 The sentence issued by the Court was he had to serve
8 at least one year and six months on two of the three and then
9 six months on another. That's what the Court decides. Once he
10 serves that time, jurisdiction over the defendant shifts from
11 the Court to the Michigan Department of Corrections and the
12 parole board and depending on how they allocated the time that
13 he served to whatever offense they were allocating it toward
14 could in fact keep him past the statutory maximum if he's not
15 getting that credit until later on and we don't know what they
16 did, but we do what the end result was based on the records.

17 THE COURT: Well, that's what I'm wondering, do we
18 know the end result. I'm looking at the presentence
19 investigation report and for each of these convictions it's
20 showing released from parole February 5 of 2015. I'm not sure
21 where that's coming from, especially in light of this
22 information sheet from MDOC saying the maximum would be reached
23 either in 2003 or 2002.

24 MR. ROTH: I think --

25 THE COURT: How do you explain that?

1 MR. ROTH: I think that he was released from parole
2 on the murder case on 2013 and 2015 and what you're looking at
3 is and probation can correct me if I'm wrong, but it's listed
4 on pretty much all of them. I think you're just getting a
5 complete synopsis of his history with the Michigan Department
6 of Correction because I believe he was released around 2013
7 before this, before our case started. So I think you're
8 looking at when he was off on the second degree murder case.

9 According to the records that probation has, it looks
10 as if with respect to the convictions that are in dispute, he
11 was held on those until 2002 and 2003 which means that however
12 they allocated credit, that, those sentences weren't completed
13 until those times and again I'm not suggesting that they have
14 the power or they changed the sentence of the Court that
15 imposed those sentences, I'm suggesting that MDOC imposed some
16 sort of penalty on him for escaping and absconding and getting
17 a second degree murder charge which really makes sense because
18 when you have those violations, is he automatically to come
19 back as if nothing happened? It's natural and we do that in
20 the federal system that when you engage in, you get violations
21 in the system or you're doing things you're not supposed to do,
22 there's a penalty; they take away good time or put you in
23 solitary. There's consequences for those actions and it looks
24 like those consequences for him was that the parole was
25 extended past 2000.

1 THE COURT: What I'm still trying to understand is
2 for the convictions that are set out in paragraphs 38, 39, 40
3 and 41, each one says released from parole, 2-5-2015 which
4 doesn't seem to square with what's on the sheet that says the
5 maximum for at least 40 and 41 would have been reached in 2003
6 or 2002. Do you want to explain that?

7 PROBATION OFFICER LUKE: Your Honor, if I may, I
8 believe because he, umm, Mr. Bell had the sentence for the
9 second degree murder, all, this all kind of ran together and he
10 remained in custody and that sentence, custodial part of his
11 sentence for those older offenses may have completed in 2003 or
12 2002, however he still, they could have put him back on parole
13 for all these offenses at the same time when he finished his
14 second degree murder charge. As I stated, his criminal history
15 printout on ATLAS indicates that none of the older cases were
16 officially closed until the completion of his parole in 2015
17 and those were closed by legal order and it would be my
18 understanding is is that he was then released on parole for all
19 those charges because he couldn't be released from parole when
20 he finished in 2003 because he was still serving the second
21 degree murder sentence.

22 THE COURT: All right. Well, thank you. It seems to
23 me we're making some assumptions here about what MDOC did or
24 could have done and I'm thinking maybe we need to go back to
25 MDOC and get something definitive about when did parole end for

1 Mr. Bell for all of these convictions because it sounds like
2 we're making some assumptions that they were impacted by the
3 murder conviction and then we're not really sure did they end
4 his parole at that point? Did they suspend it? Did it
5 continue to run? Let me know why you think that is a good idea
6 or bad idea.

7 PROBATION OFFICER LUKE: So it would be the position
8 of the probation department that his, his parole stopped when
9 he returned to custody for the second degree murder charge. He
10 was given parole violations as evidenced by the sheet of paper
11 I provided the Court and the parties earlier and that on his
12 movement sheet in, so the sheet provided by the Michigan
13 Department of Corrections that shows when he returns to
14 custody, when he absconded, when he escaped, when he returned
15 to custody finally for the second degree murder offense and
16 when he was ultimately paroled again for the final time in
17 2013, he was discharged from parole in 2015. There's no
18 indication in any records that the older cases were closed, his
19 parole was completed or anything like that prior to 2015. In
20 2015 he was discharged from parole and it -- that is when all
21 of his cases based on the records probation have were closed by
22 the state of Michigan.

23 THE COURT: Now you don't have any paperwork at all
24 though on the convictions reflected in paragraphs 38 and 39,
25 right?

1 PROBATION OFFICER LUKE: I don't, your Honor.

2 THE COURT: All right, so how can we make any
3 decisions regarding those convictions?

4 MR. ROTH: Your Honor, if I may? If the Court was to
5 grant the defendant's objection and strike those prior
6 convictions and find that they don't count, his guideline range
7 depending on how the Court rules on the offense variables could
8 remain the same even without those convictions. It would drop
9 him down to a category three and at the offense variable
10 decided by the probation which is 40, he would still have 360
11 to life guidelines so what I would suggest to the Court is if
12 we could put this on the back-burner for now and go through the
13 remainder of the objections, that it may end up being a moot
14 point meaning that we may just agree not to score the
15 convictions being challenged by the defense because it will not
16 make a difference at his ultimate guideline range depending on
17 how the Court rules on the offense variables and I would tell
18 the Court in complete candor that if that is the case, I will
19 stipulate that for the purposes of this hearing that we won't
20 score that because it will not make a difference and it would
21 allow us to proceed at this time.

22 THE COURT: Mr. Amberg?

23 MR. AMBERG: Well, the only thing I would say in
24 response is that through the BOP, that they do look at your
25 criminal history when they're doing things. My understanding

1 is like for example the difference would be between a category
2 three versus a category six. Now I understand there's career
3 offender, but I think that might be important to BOP
4 calculations for what programs Mr. Bell is eligible for, where
5 he stays during his time of incarceration so it would have to
6 have a ruling on that no matter what and, umm, so if the
7 government's conceding that these priors can't be used 'cause
8 they're outside of the 15 years, then great, then that'd be
9 perfect and now we can move on to the rest of the stuff, but I
10 think the Court has to make a finding on that. Otherwise,
11 we're going to -- Mr. Bell will be in limbo there at the BOP.

12 THE COURT: Mr. Roth?

13 MR. ROTH: Your Honor, I would reiterate what I said
14 which is if we end up at the same guideline range that we're at
15 with the convictions without them based on the rulings of the
16 Court, I think there's a good possibility that we would just
17 agree not to count those so that we can complete sentencing
18 today.

19 THE COURT: Well, Mr. Amberg, maybe I'm not following
20 exactly what you're saying. If Mr. Roth is right and it
21 doesn't change the guidelines assuming I rule the way the
22 government's asking me to rule with regarding to the offense
23 variables, what purpose is served by determining the criminal
24 history category? You're saying that in and of itself will
25 determine certain things like what programs he's eligible for?

1 MR. AMBERG: I -- my experience has been that the BOP
2 does look at that. I'm not sure, I'm not expert on it, but I
3 do know that that may come into the calculation about
4 everything from programs to where he would go and also I would
5 say it would also go into my argument for, umm, you know, what
6 he should actually be looking at guideline-wise and as a
7 mitigation on a sentence because --

8 THE COURT: Well, if we don't score these
9 convictions, then he'd be in a different criminal category,
10 right?

11 MR. ROTH: I believe he has 16 criminal history
12 points and striking those convictions would be 12 less which
13 would give him four criminal history points which would put him
14 at a category three. If the offense level is as probation
15 calculated it at 40, category -- offense level 40, category
16 three would still have the same guideline range.

17 THE COURT: So wouldn't he be eligible for the
18 programs of someone who's in a category three then? I'm not
19 following how he is in any way prejudiced then.

20 MR. AMBERG: Well, if, I guess if the government's
21 okay with it. You know, if everybody agrees that this
22 shouldn't be scored, then I think that's what we're looking
23 for.

24 THE COURT: Well, that's what I understood the
25 government to be saying that after the offense level

1 calculations are completed, if I'm in agreement with what the
2 government's asking me to do, then they don't have any
3 objection then to not scoring these convictions and dropping
4 him then into a category three. Is that right? I'm hearing
5 that right?

6 MR. ROTH: You're hearing it correct your Honor and
7 I'm not asking for the Court to impose sentence before that
8 decision is made. I'm just saying if we reach the same
9 guideline and it's, in my opinion it's moot and in fact it's to
10 the advantage of Mr. Bell because if I dismiss -- if I agree
11 that those don't count, it does drop his criminal history
12 category which could only improve his position in a facility
13 that has the programming he wants. So I think that, you know,
14 we have a substantial interest in where the sentencing falls
15 and I'm offering to temporarily table the discussion about the
16 criminal history categories, we may still get there, in which
17 case I don't think it's worth the time and energy of the Court
18 to have to deal with the older 1989 and 1990 convictions.

19 THE COURT: All right. Let me look at one of the
20 issues that impact the offense level and I want to make sure I
21 understand the respective positions and this has to do with the
22 drug quantities and specifically the government's position that
23 the base offense level should be 30. The defense is saying it
24 should be 24, umm, I think it's saying 24. The presentence
25 investigation report says the base offense level is 30 although

1 the quantities that are set out in paragraph 27 for the base
2 offense level don't quite match the quantities that are set out
3 on page 26 of the government's memorandum so I want some
4 clarity whether the base offense level in the government's view
5 of 30 represents eliminating the sentence disparity for
6 powdered or crack or is something else at work here because
7 again the quantities don't seem to match up.

8 MR. ROTH: Your Honor, with respect to the
9 quantities, it's the position of the Department of Justice to
10 advise the Court as to its position as to powder to crack
11 disparity. The Court has absolute discretion as to whether or
12 not it wants to consider the disparity or if the Court wants to
13 go forward and sentence the defendant based on the crack
14 cocaine.

15 We presented our calculations as to the quantities
16 that we believe the defendant distributed as part of the, was
17 his role in the conspiracy and we think it's at 34 and our
18 calculation is different than the probation department 'cause
19 the probation department just considered the statutory minimums
20 that trigger the 10-year mandatory minimum, but we know based
21 on the testimony at trial that there was much more than just
22 that. So because that's what the conviction was for on the,
23 umm, that the jury looked at, that is why they're at those
24 levels. 280 is the mandatory minimum to trigger the 10 year
25 for crack cocaine and 100 for heroin, but we believe that the

1 evidence shows that there was a lot more and that is the
2 differential between what we have represented in our sentencing
3 memorandum and what probation has on the presentence
4 investigation report.

5 THE COURT: So your statement at the bottom of page
6 26 when you say the converted drug weight puts Bell at an
7 offense level of 30, is that after eliminating the powder to
8 crack sentencing disparity?

9 MR. ROTH: Yes. It was simply done so that the Court
10 could see the difference between if it did or did not sentence
11 under the cocaine crack disparity.

12 THE COURT: All right.

13 MR. ROTH: So if the Court was to sentence crack as
14 crack in the guidelines, it would be level 34. If the Court
15 was to use the conversion ratio for powder cocaine, it would be
16 30 so we are at the same level as probation with the
17 conversion, but higher without based on the testimony at trial
18 and the evidence in the case.

19 THE COURT: Okay. So Mr. Amberg, do you agree that
20 if we eliminate the powder to crack disparity, then Mr. Bell's
21 offense level is 30?

22 MR. AMBERG: No, your Honor. I agree with probation,
23 we start at 30. Once you do the disparity and equal the crack
24 to powder cocaine, it would be a level 24. The government,
25 what they're saying is hey, we don't agree with probation, we

1 think that the underlying quantity is higher and of course I
2 disagree with that. The jury found what they found and those
3 were the numbers that were put in front of them. A lot of what
4 the government relies on is speculative through witnesses who
5 in my opinion were not believable and, you know, I think the
6 probation department got it right, it starts at a level 30 and
7 if you look in my brief, I convert that crack drug weight
8 'cause it starts out at 280 grams of crack and that would be
9 999 kilograms of converted drug weight, but if it's just
10 regular cocaine then the converted drug weight is 56 kilograms
11 so you can see that major disparity there between the two and
12 that's how I got to 24 is applying what the Department of
13 Justice wants us to do or at least as I've attached Merrick
14 Garland's advocacy for doing that. So I disagree with the
15 amount of narcotics that the, the quantity the government has
16 put forward. I agree with probation and it should be a level
17 24, your Honor.

18 THE COURT: Well, what's the authority for using the
19 statutory numbers versus using what the jury found? Where do I
20 look to find which one I'm supposed to follow?

21 MR. AMBERG: Well, I think in this situation it's the
22 same thing. That level 30 that is in the presentence report,
23 that is reflecting what the jury found. So, I mean, the jury
24 was as Mr. Roth said, they were deciding a drug quantity amount
25 which was important for purposes of mandatory minimums, but

1 that was what the jury found and so this is not a clearcut case
2 by any means so when we are saying to ourselves we should or
3 the government is advocating to go higher than that what the
4 jury found, I would argue that as I've argued with other parts
5 of my memorandum, it's, umm, you know, we're taking things away
6 from the province of the jury although I understand that
7 there's no statute or case that stands for that proposition.
8 When you look at like Judge Sotomayor's, part of her opinion in
9 that McClinton case, you kind of see the reality of the
10 situation. When the government comes in and advocates for
11 things far higher than what the jury is deciding, it sort of
12 makes you wonder why did we have a trial in the first place.

13 So to answer your question, your Honor, I don't think
14 there's any statute that says you have to follow what probation
15 decides or that what the jury decides, but I think that if you
16 asked the average person on the street what would be fair,
17 that's what would be fair. The jury didn't decide it was this
18 much more significant number that the government wants the
19 Court to apply. I was in this trial. Your Honor was here.
20 Those witnesses were not believable. Ms. Gaggo was not
21 believable. There was an acquittal in this case for the main
22 witness that started this case. I think that the idea to just
23 simply say hey, all these people were credible and we're going
24 to elevate this drug quantity I think does a disservice to the
25 jury in this case and because of that, I would ask that your

1 Honor follow what probation recommended except take away the
2 crack to cocaine disparity and find a level 24.

3 MR. ROTH: Your Honor, defense counsel is just wrong.
4 There's no other way to say it. The case law says that the
5 Court must prove the weight -- the government must prove the
6 weight of any drugs by a preponderance of the evidence and that
7 the Court must choose an estimate of that drug that protects
8 the defendant from a drug quantity higher than what they're
9 actually responsible for. The burden is on us to show by a
10 preponderance of the evidence that the weight we think should
11 be taken into consideration is the correct weight.

12 When defense counsel says the jury has spoken, the
13 jury was never asked how much quantity of drugs did Darrick
14 Bell or is Darrick Bell responsible for. The jury was asked
15 according to the case law whether or not he distributed at
16 least the threshold for them to trigger the mandatory minimum.
17 That's what they are required to decide by law, that's what the
18 case law says, they have to decide what that, that threshold
19 was met, but the Court can take into consideration the totality
20 of the evidence from the testimony that was provided and make a
21 determination of whether that amount of distribution was
22 actually higher and that's what the Court's duty is and that's
23 what the case law says.

24 This is not about taking this out of the hands of the
25 jury nor is it about going up and down Fort Street asking a

1 regular person if they think it's fair and to talk about
2 Sotomayor is conflating one argument he has about using
3 acquitted conduct with what we're actually talking about here
4 which is determining the drug quantity. That's what the Court
5 needs to do. When the Court determines the drug quantity, the
6 Court has to make sure that the amount it determines is not
7 more than what the defendant actually distributed. How does
8 the Court do that? The Court's to engage in a conservative
9 estimate of how much he distributed which is exactly what we
10 did in our sentencing memorandum.

11 We took the most conservative approach we could take.
12 We used testimony from trial and it's completely irrelevant
13 whether Mr. Amberg believed Brian Dougherty, Janet Gaggio, Sarah
14 Fernandez, Amanda Pauley, Rachel Ayers, it doesn't matter what
15 Mr. Amberg thinks of their testimony. This Court heard the
16 testimony collectively of everyone and what we heard was that
17 all the drugs flowing through the Victory Inn or the vast
18 Majority of them came from Darrick Bell. So we took the
19 testimony from trial, we took the Rule 11 Plea Agreements where
20 people made admissions about what they distributed and we cut
21 it all down to make a very, very conservative estimate about
22 how much Darrick Bell's conspiracy and Darrick Bell himself is
23 responsible for and that's where that number goes in. That's
24 where that number comes from to put us at a base offense level
25 of 34 and we outlined those calculations in our sentencing

1 memorandum.

2 Defense counsel's argument about whether it's fair is
3 just way off base. This Court has the power and the duty to
4 determine what the base offense level is based on the drug
5 quantity and the Court can decide Brian Dougherty was not
6 credible, that's the Court's call, not defense counsel, but the
7 Court's call, but I think when you look at the totality of the
8 evidence and our suggestions at how to -- our arguments as to
9 how we show what we show, I think we are soundly at a base
10 offense level of 34.

11 THE COURT: All right. I need to look at something.
12 Hold on.

13 (Pause)

14 THE COURT: All right. So the government's position
15 is that paragraph 27 in the presentence investigation report
16 properly sets forth 30 as the base offense level after taking
17 into account elimination of the disparity, but that's because
18 the government is saying there's evidence at trial for higher
19 drug weights. Is that right?

20 MR. ROTH: Yes, your Honor.

21 THE COURT: Drug quantities, and the defense thinks
22 that 30 is properly scored based on the statutory quantities,
23 but that it should be reduced to eliminate disparities and get
24 us down to 24. Is that right?

25 MR. AMBERG: Yes and the lack of credibility of the

1 witnesses and evidence at the trial.

2 THE COURT: All right. The problem I'm having is
3 this wasn't exactly presented this way between the presentence
4 investigation report and the memoranda. It, it would appear
5 the only dis -- well, I wasn't even sure there was a
6 disagreement, but it wasn't presented as whether we should use
7 the statutory figures or whether we should use trial testimony
8 and so now I'm struggling to see what am I supposed to do in
9 terms of picking between those two measures? Where do I look
10 for that, Mr. Roth?

11 MR. ROTH: Your Honor, we cited cases in our
12 memorandum on page 20 that does address this issue. There's a
13 new case out that just came out in February of 2024,
14 United States v. Histed, H-i-s-t-e-d, 2024 West Law, 726245
15 that says that the district court relies on -- it talks about
16 the evidence that the district court relies on to support the
17 estimate must have a minimum level of reliability and the Court
18 needs to err on the side of caution in making its estimate and
19 what that Court did was they looked at the evidence that was
20 presented and used the evidence to determine what they thought
21 was a reasonable amount for the drug quantity and if the Court
22 considers it in the context of how the guidelines were written,
23 the guidelines are written for different levels and different
24 quantities. If the Court's only responsibility was to look at
25 the mandatory minimum, we wouldn't have this sliding scale on

1 the drug quantity table of different levels for different
2 amounts. The jury is only required to come up with the
3 mandatory minimum as defined by statute. It says not less than
4 280 grams or not less than 100 grams of heroin.

5 What we're asking the Court to do is to look at the
6 evidence that was presented at trial as we wrote in our
7 sentencing memorandum, look at what other defendants admitted
8 to distributing in their Rule 11 agreements and that a Court
9 can use that evidence of what happened at trial and what's
10 happened -- what's listed in the Rule 11s to find by a
11 preponderance of the evidence whether or not it is a fair
12 estimate conservatively by the government as to what the
13 quantity is. There is no other sources of information the
14 Court can look to. The Court has to look at what happened at
15 trial and what the witnesses said which is why we extensively
16 quoted the witnesses directly from the transcripts and the Rule
17 11s in our sentencing memorandum.

18 MR. AMBERG: Your Honor?

19 THE COURT: Yes.

20 MR. AMBERG: Here's why you don't see me talking
21 about this in our memorandum, because when the government had
22 the chance to make an objection to that level 30, they didn't
23 do it. When you actually look at the PSI when you go to page
24 ID 11092, objections by the government, none. I take that to
25 mean that they agree that the level 30 was it and that's why --

1 THE COURT: Well, they do agree that level 30 is it,
2 but it's getting there in a different route. It's not
3 objecting to the number, it's saying that is the number, the
4 number is because it starts higher and gets reduced because of
5 elimination of disparity.

6 MR. AMBERG: Well, I, I mean, I understand --

7 THE COURT: I'm not necessarily disagreeing with you,
8 but when you look at this, that's one way to look at this as
9 not calling for an objection, but it makes my job a whole lot
10 harder now because I haven't seen this as the dispute between
11 you two.

12 MR. AMBERG: Right and I would say this, your Honor.
13 I understand, I think it's just by coincidence that it comes
14 back to level 30. That should have been in here as an
15 objection. We object to 'cause it's not 30 at the end, the
16 probation department's PSI puts on there their reasoning for
17 why it's a level 30 so how am I supposed to, you know, I have
18 to make objections when I'm supposed to, right, and as you can
19 see I made a bunch of them and that there's no objections by
20 the government for the probation department finding the numbers
21 that I agreed with, not this new, this is something new that we
22 just learned about a week ago. So I would, I think that the
23 government had their chance to make this objection and they
24 didn't do it and because of that they're stuck with this level
25 30. I get it that with the crack disparity it brings the

1 guideline level down, but that's not my problem. They should
2 have made the objection then and we could have had at it, umm,
3 properly like if it was me.

4 THE COURT: All right. So Mr. Roth, maybe you can
5 explain why Mr. Amberg is wrong if that's your view. He's
6 saying you didn't lay out the analysis of disagreeing with the
7 way in which probation got to 30, you apparently agreed with
8 the 30, but not the way probation got to 30. Is that correct?
9 Is that a proper way to look at what has happened here?

10 MR. ROTH: Your Honor, if I may just have one moment?
11 I just want to look at one thing real quick.

12 (Pause)

13 MR. ROTH: Your Honor, I'm going to tell the Court
14 two different things. One, I have Mr. Amberg's objections in
15 front of me and I don't see him making any reference to asking
16 for it to be 24, so I may be missing it, but I have a copy of
17 it here, so, you know, the same argument can be said to him
18 that if he doesn't object and say it should be a 24, then it
19 should be a 30 like probation says, but I would respond to the
20 Court this way. The Court has the discretion to determine
21 whether or not it wants to apply disparity. There is no rule
22 that says it has to do that and although I could have objected
23 specifically and said that I got to that number a different
24 way, I believe that given the department's policy, that 30 is
25 the right answer. I did get there a different way and in

1 retrospect it would have been prudent to outline the way I got
2 there, but the fact of the matter is the law still has the
3 Court, puts the duty on the Court to determine what the fair
4 quantity is and we're not saying it should be more than 30,
5 we're saying is we think the quantity's a base offense level of
6 34. With the disparity, it's a 30. Mr. Amberg could have put
7 on there and if I'm wrong, Mr. Amberg can correct me, he could
8 have put on there we agree that it's a 30, but the disparity it
9 should be 24, but he didn't do that either because we were both
10 looking at 30 as the correct ultimate, I looked at it as the
11 correct conclusion. He looked at it as a starting point and
12 went down from there. So I apologize to the Court if I
13 wasn't -- if I should have been more clear, but I think that
14 when I look at it and I don't see him objecting to the 30 and I
15 agree that the 30's right, I think that that's where we end up.

16 MR. AMBERG: I -- it's comparing apples to oranges,
17 your Honor. There's a big difference between when you look at
18 the PSI on parenthetical 27 where the probation department is
19 telling us how they got to this number, which I agree with.

20 My arguments for the disparity is a persuasive
21 argument. That's not by law. That's not an agreement that I
22 have to put in any way in any objections 'cause it's not an
23 objected -- it's not something you would object to. On the
24 other hand the government certainly if they objected to that
25 finding, they had to object to it so I had no reason to do that

1 because I don't expect anybody would say hey I object to
2 something because I feel it's persuasive. All the disparity is
3 and what I've attached to my brief is persuasive. That's all
4 that that is. Your Honor doesn't have to follow that. I mean,
5 that's just what the Department of Justice has put out as
6 persuasive, but the government had that chance to object to the
7 finding on paragraph 27. It's very specific and tells
8 everybody how the weights were found to be and they didn't do
9 it and because of that, here we are now at the sentencing and
10 there is an objection there, but I didn't respond to that
11 because I agree with the way probation found and there was no
12 objection. You can see how you object. Look at how I objected
13 to everything else on here, so.

14 THE COURT: Mr. Amberg, doesn't paragraph 66 set out
15 the guideline calculation based on a total offense level of 40
16 and a criminal history category of six and there's no objection
17 I don't believe from you to that paragraph, right?

18 MR. AMBERG: Right 'cause that's the career offender,
19 your Honor.

20 THE COURT: Huh?

21 MR. AMBERG: That's the career offender guidelines I
22 believe? Well, I mean, I objected to the specific things I
23 thought should be changed within the guidelines. You can see
24 all of my objections at the end, your Honor.

25 THE COURT: There's no objection regarding the

1 guideline range other than you talk about the career offender
2 not being -- should not be scored because of prior convictions
3 being too old which is what we talked about earlier in this
4 hearing.

5 MR. AMBERG: I think that just applies to count
6 eight, right? The maximum of count eight is 20 years, so and I
7 think that's what it says on paragraph 66.

8 THE COURT: Well, however you slice and dice it, it
9 doesn't sound like this issue has been actually laid out fully
10 in what has been presented and that's my concern. I don't
11 really have a defense response to the argument of the evidence
12 that's been presented about why calculations of quantities
13 should be higher than what the minimums were that were found by
14 the jury.

15 All right, I want you to hold that thought for just a
16 moment because you've got another problem and that has to do
17 with the acquitted conduct issue. It seems to me the argument
18 about the trafficking evidence being utilized here doesn't turn
19 necessarily on a count for which Mr. Bell was acquitted. It
20 was one subsequent trafficking count for which he was
21 acquitted, but the count of conspiracy was a count in which the
22 jury could not agree, so it seems to me the government is
23 actually not trying to use acquitted conduct, the government's
24 trying to use conduct as to which the jury didn't reach a
25 verdict, umm, so that's point one I just wanted to throw out

1 for your consideration.

2 The other point occurs to me is that it would seem to
3 me that the government could point to much of the same
4 testimony, maybe all of the testimony that went to count one as
5 a violation of Michigan state law of someone who arranges for
6 commercial sex activity which would not have raised any of the
7 issues that we know from the jury questions that were submitted
8 to us that may have been, may have been issues for the jury;
9 namely, the issue of coercion and the issue of interstate nexus
10 which I don't believe would be issues that would have impacted
11 a state prosecution. So my question for your consideration is
12 can I take into account the testimony that made out state
13 crimes without the additional federal issues that may have
14 impacted the jury's decision-making about count one? I wanted
15 to get your reaction to that. Mr. Amberg?

16 MR. AMBERG: Yes, your Honor. No. That's my
17 reaction, no. Very -- I believe very much that in this case,
18 the jury acquitted Mr. Bell of one of these counts and the jury
19 hung on the rest. The government chose to not proceed. We
20 want, we want our trial. We want that. The jury has or the
21 government has chosen to not proceed further and just stick
22 with the convictions for the drug conspiracy. I understand why
23 they did that, but for us this has always been about the sex
24 trafficking and he is not a sex trafficker. That's what it's
25 always been about so this idea that to look at well maybe in

1 the state system this might be, you know, sex trafficking or
2 maybe -- it's so unfair and it's everything that the Court was
3 talking about in the McClinton case and that's why I put it in
4 there and quoted it so much because it's -- if we're going
5 to -- what is the point of having a trial if the government can
6 just say oh it's a hung jury, you know what, we're going to
7 just dismiss everything and guess what, we're going to hold you
8 responsible for it anyways. I mean, that's what's going on
9 here. I think it's completely unfair. It's so unfair. It
10 just cuts through the reasons why we have jury trials and put
11 things in the province of the jury all together. So this idea
12 that maybe the state of Michigan stuff can be used? Well, why?
13 We're here for a drug conspiracy prosecution, not a sex
14 trafficking hung jury and acquittal. We're here for, like does
15 that have something to do with whether or not Mr. Bell was
16 selling drugs? I would say no. I don't even think your Honor
17 should consider it. I mean, why don't we treat this for what
18 it really is? This is a small-level drug conspiracy case and
19 we should be looking at it as such and your Honor should be
20 deciding your sentencing based on that.

21 I think it's very clear that the Supreme Court feels
22 like this might be unconstitutional. I would say it goes
23 beyond acquitted conduct, it all goes within that same umbrella
24 because if you think about it, I mean, hung jury doesn't mean
25 conviction at all, it doesn't. It means government should if

1 they believe that my client did this, retry him, let's go.
2 We've been ready. We've always been ready, you know?
3 Unfortunately they chose not to do that, so they should have to
4 suffer the consequences of that. So to answer your question,
5 no, no, your Honor. Thank you.

6 THE COURT: Okay. Mr. Roth?

7 MR. ROTH: Your Honor, is the Court talking about
8 determining the guidelines or is the Court talking about just
9 allocution or is it talking --

10 THE COURT: Just allocution, not guidelines.

11 MR. ROTH: Okay. So Judge, I looked at the McClinton
12 case that defendant cited and, umm, they punted the issue and I
13 think that there's some movement some time maybe in the future
14 where they're going to tell us not to look at acquitted
15 conduct, but what the Solicitor General said on behalf of the
16 United States in its response was that judges have always had
17 broad discretion to engage in factfinding to determine an
18 appropriate sentence within the statutory range and they've
19 enjoyed historically the discretion to impose a sentence based
20 on additional facts that are found by a preponderance of the
21 evidence. There's a statute on point that's 18 U.S.C., 3661
22 that says there shall be no limitation placed on the
23 information concerning the background, character and conduct of
24 a person convicted of an offense and considered for the purpose
25 of imposing an appropriate sentence and what the Solicitor

1 General says in the McKinney case -- is it McKinney, the
2 Clinton case, sorry, the McClinton case, Judge, is essentially
3 if you're only allowed to argue what the defendant was
4 convicted of, then you're only allowed to argue the things that
5 make up the elements of the offense and that's not how this
6 system of justice has worked since the beginning.

7 The Court is not precluded from sentencing someone
8 using tunnel vision. All the time we look at facts that are
9 outside of what a defendant pled to or what a defendant was
10 convicted of when we're trying to find the appropriate sentence
11 and what defense counsel wants you to do is completely ignore
12 everything you heard about the sex trafficking victims and he's
13 saying you got to just ignore all of it, it's not fair, but
14 it's not necessarily about whether it's fair or not. You were
15 present during the trial. You heard the testimony. You get to
16 judge the credibility of the witnesses that you heard when
17 you're thinking about what the appropriate sentence should be.
18 That's all that we're talking about. I'm not asking you to
19 give him a higher guideline range because of anything to do
20 with the sex trafficking. In fact, all of our responses to his
21 objections are based just on the drug trafficking, but since
22 when is a Court required to put on blinders and say I'm not
23 going to think about the fact that these women were engaged in
24 commercial sex acts and that's what made them so good for his
25 drug trafficking conspiracy? Since when is this Court going to

1 have to ignore the violence that we heard that the women
2 suffered because they were forced to engage in sex trafficking
3 to buy his drugs? These cases are, it's like what came first,
4 the chicken or the egg; which was happening first, the sex
5 trafficking or the drugs? We're not going to know, but they're
6 so intertwined, to ask this Court to put blinders on and ignore
7 what composes of half of this case is preposterous and that's
8 what the Supreme Court has said over and over again and that's
9 what courts around the country have said.

10 You're not just going to consid -- you're not looking
11 at acquitted conduct and saying well even though he was found
12 not guilty, I'm going to think he's guilty. That's the wrong
13 lens to look at this. You're looking at it saying I heard
14 Amanda Pauly testify about the horrors that the women went
15 through to buy the drugs from Darrick Bell. I heard what they
16 had to go through to buy the drugs from Darrick Bell and that
17 is why his drug conspiracy which is nothing if not large and
18 enormous, that's why his drug conspiracy was so evil because he
19 chose a location where these women existed, where these women
20 could work the streets to buy his drugs, so to say don't
21 consider any of that isn't how it works. You get to consider
22 what you think is credible evidence that you think existed
23 based on preponderance of the evidence and that is so that you
24 can fashion a sentence that you think is just, within the
25 statutory scheme laid out by Congress.

1 THE COURT: I want you to respond to the issue of
2 whether I can take into account that the testimony made out
3 violations of Michigan criminal law.

4 MR. ROTH: I think you can take up whatever you think
5 is appropriate for your own consideration because I think it's
6 all the same. If you think that he engaged in other criminal
7 conduct that broke other laws when you're looking at the
8 3553(a) factors, you can consider that. You can consider
9 things that he did he wasn't charged with when fashioning a
10 sentence 'cause that's what 18 U.S.C., 3661 tells us and that's
11 what the case law up to this point tells us is that you can
12 consider things that he did to determine what is necessary to
13 make sure that the public is safe for him.

14 What is just punishment? If this Court is looking at
15 a conviction for drug trafficking, in and of itself just
16 punishment may mean one thing to the Court, but if the Court is
17 looking at a case where there's drug dealing and there's a lot
18 of violence, that may be just punishment may mean something
19 else. No one has ever said and no one will tell a judge you
20 have to look at just what was convicted of.

21 You're the judge. You get to look at things that you
22 think are relevant to fashioning a sentence whether it's
23 violations of state law, acquitted conduct or hung juries. You
24 heard the testimony. You get to make your own credibility
25 determination about whether or not that warrants you to

1 sentence in one direction or another.

2 THE COURT: Mr. Amberg, anything else?

3 MR. AMBERG: Yes, your Honor. I'm going to read
4 Justice Sotomayor quotes because she's a much more brilliant
5 lawyer than I ever could be and I think she really nails it
6 here and why you should not consider this stuff and this is on
7 page three of my brief. An acquittal may quote "reflect the
8 jury's conclusion that the state's witnesses were lying and
9 that the defendant is innocent of the alleged crime," unquote.
10 A, quote, "jury trial is no mere procedural formality, but a
11 fundamental reservation of power in our constitutional
12 structure," unquote. Quote, "concerns about procedural
13 fairness and accuracy when the state gets a second bite at the
14 apple with evidence that did not convince the jury coupled with
15 a lower standard of proof" unquote and that, quote, "acquitted
16 conduct sentencing also raises questions about the public's
17 perception that justice is being done, a concern that is vital
18 to the legitimacy of the criminal justice system."

19 That's exactly what we have here, Judge, because what
20 was the point of having a jury trial, because what the
21 government is really trying to do is come in here and say you
22 should give Mr. Bell 35 years because of all the sex
23 trafficking stuff that he either got acquitted of or we
24 dismissed. The idea of using the state sex trafficking thing,
25 something that was not on that jury verdict form nor argued by

1 us is just another version of that. It's completely unfair.
2 That's exactly what Justice Sotomayor is saying. That's why
3 the Supreme Court looked to the Sentencing Guideline
4 Commission, said make that change because it's time for that to
5 change. Now I'm not saying your Honor can't look at the
6 overall case, I think you can, but there's a big difference
7 between that and saying I'm going to sentence you, Mr. Bell,
8 for all this time based on something that you went to trial for
9 because you believed you were not guilty of it and guess what,
10 the jury also felt that way. Now I know there was a hung, most
11 of those counts were hung, but there was an acquittal on the
12 main witness who started this whole thing and like I said
13 before, the government chose to dismiss it.

14 So if they wanted to come in here and argue it should
15 be sex trafficking, then let's do a trial. Let's go. We've
16 been ready since day one. We came in here and for two months
17 we showed this jury why Mr. Bell was not a sex trafficker and
18 he is not. So your Honor, I would say at this sentencing today
19 that you should just look at the drug convictions and the drug
20 case and that's it because everything else is just designed to
21 punish him for something that the jury said no to. Thank you.

22 THE COURT: So is the rule you would want me to
23 follow or the principle you'd want me to follow is if the
24 government tries to prove a defendant has violated the law and
25 that doesn't result in a conviction, then none of the evidence

1 going to that charge can be used by a sentencing judge?

2 MR. AMBERG: Sure.

3 THE COURT: That's what you would say is the
4 principle I should follow?

5 MR. AMBERG: I believe that's the way it should be.

6 THE COURT: Even if that relates to the charge on
7 which he was convicted?

8 MR. AMBERG: Well then that's a bit of a different
9 story because yes and I think that and you're right, your
10 Honor, there should be a distinction there because you do have
11 a drug case and I have been in many sentencings where the
12 government will come in and say, you know, drugs are terrible
13 in society, things like that, like I think you can say that,
14 that's fine, but there's a big difference between that and
15 saying -- what's happening here is completely different.
16 What's happening here is all the stuff for the case we couldn't
17 prove, you should be looking at Judge because this is what's
18 really happening, sex trafficking was happening and all this
19 terrible stuff was happening. No, they didn't prove that.

20 It's a drug case. Yes, I get it, society has, like
21 drugs have societal consequences that orbit around the sale of
22 drugs. That's in every single case. That's in every single
23 drug case. I'm sorry, anytime we have a drug case, that's a
24 part it and so yes I think you can consider that, your Honor,
25 but the specifics here where we have a jury acquitting and the

1 government dismissing the remaining charges is a big difference
2 than the general notion that yes, the sale of drugs can have
3 negative societal consequences.

4 MR. ROTH: Your Honor, what if a drug conspiracy was
5 selling drugs to minors and they were just convicted of dealing
6 drugs, does the Court get to take into consideration that they
7 were minors? What if they go to a homeless shelter and recruit
8 people from a homeless shelter to sell drugs. Well, they're
9 just convicted of selling drugs so we can't take into account
10 they went to a homeless shelter and got homeless people to deal
11 drugs for them or illegal immigrants or any permutation of
12 those facts.

13 The reality is I am not going to stand before this
14 Court and say he's a sex trafficker, a convicted sex
15 trafficker, he's got to go, but I do get to go before this
16 Court and say when he created his conspiracy to distribute
17 drugs, when he chose the people that he chose to be his
18 co-conspirators, when he chose his location, he did that
19 because there was a vulnerable group of individuals ready to
20 buy his drugs and not just vulnerable people, but people that
21 can't even breathe without the drugs, that would buy drugs from
22 him four, five, six, seven times a day. That was his choice to
23 pick that location and this clientele and to say that you can't
24 take that into consideration is just wrong. It's just not what
25 the law says and whatever Sotomayor wrote in her opinion, they

1 still declined to grant cert and if you look at the opinion
2 there's a string cite of all the circuits that say that you can
3 consider acquitted conduct and I'm not asking you to consider
4 acquitted conduct, I'm going to ask you to look at the context
5 of the drug conspiracy and what was going on with it and who
6 they targeted and where they put it and all of that stuff
7 because he wasn't just slinging out of his house or just on a
8 block. Everything was deliberate; who he enrolled, who he
9 enticed, where he put it, all of that. It's all related to the
10 drug conspiracy and it's just incomprehensible to me for him to
11 say that you can't consider the surrounding circumstances and
12 the methodology to which he employed his conspiracy. It
13 doesn't make sense. It defies common sense.

14 THE COURT: Mr. Amberg, let me ask you this. Let's
15 assume a defendant is charged only with a drug conspiracy, but
16 there's evidence that one of the ways that the drug conspiracy
17 was facilitated was beating up drug purchasers who don't pay
18 their drug debts, but that's not charged. Could I take into
19 into account in sentencing the defendant who's convicted of the
20 drug conspiracy?

21 MR. AMBERG: I would say yes, but the guidelines
22 already do take that into account.

23 THE COURT: I'm not talking about guidelines, I'm
24 talking about in terms of setting a just sentence.

25 MR. AMBERG: Oh, I think you could, certainly, but

1 the difference between that and like Mr. Roth's example well
2 what if there was, you know, minors were involved and things
3 like that. Well, if that was a charged offense and the jury
4 acquits that person of that, then yeah, there is a problem with
5 coming in there and saying that. I mean --

6 THE COURT: Well, let me ask you about that. So an
7 acquittal or even a dismissal of charges is a non-adjudication
8 of whatever was charged; is that right?

9 MR. AMBERG: I would, I would argue that the
10 government's charging and then dismissing after a hung jury,
11 it's the same effect as an acquittal.

12 THE COURT: I misspoke. I meant a hung jury or a
13 dismissal after a hung jury. That's a non-adjudication of the
14 substance of the charge, right?

15 MR. AMBERG: True, it's a non-adjudication because it
16 does give the government the ability to re, to do another
17 trial, but then what was happening is it's being, these charges
18 are not dismissed and instead of putting this before a jury and
19 getting the acquittals on the rest of the charges which is I
20 think exactly what would happen the next time we try this,
21 instead the government is saying hey we're going to dismiss
22 everything and now we're going to hold it against you at the
23 sentencing which they are. Read the first sentence of their
24 memorandum. I'm going to read it, your Honor. The evidence at
25 trial established one unassailable conclusion, Darrick Bell was

1 the leader of a drug and sex trafficking conspiracies at the
2 Victory Inn. Make no mistake about, this isn't just general
3 societal stuff in the background. This is their argument, I
4 mean literally first sentence of their argument.

5 THE COURT: Well, I understand what their argument
6 is, but I'm trying to understand why should the government be
7 in a worse position for having prosecuted a defendant and not
8 come up with a conviction or an acquittal, then it would be had
9 it never charged, the case I gave you where the drug purchasers
10 are beat up, but there's no charge in the case of assault. You
11 agreed there that I could take into account the assaultive
12 behavior in sentencing someone convicted of the drug
13 conspiracy. So why is the government going to be in a worse
14 position if it had charged assaults and the jury didn't reach a
15 verdict on that?

16 MR. AMBERG: Well, because we put it in the province
17 of the jury.

18 THE COURT: But aren't you even in a better position
19 there? The charge has been made, you've had every incentive to
20 put in whatever evidence you might have wanted to put in or to
21 challenge the government's evidence whereas if you hadn't been
22 charged or your client hadn't been charged, there really
23 wouldn't be perhaps quite the same incentive, but here Mr. Bell
24 had every incentive to put forth whatever evidence there was
25 regarding sex trafficking and to challenge whatever evidence

1 was put in regarding sex trafficking. So there's no hiding of
2 the ball, is there? The defense had every opportunity to make
3 as good a case as possible. Why wouldn't the sentencing judge
4 then have the benefit of all of that evidence because there,
5 the defense had every incentive to resist it?

6 MR. AMBERG: Which we did.

7 THE COURT: Which you did.

8 MR. AMBERG: Very vigorously from what I recall --

9 THE COURT: Right.

10 MR. AMBERG: -- and of course it worked out because
11 the jury I think was clear that they all agreed at least for
12 one part of this that the government hadn't met their burden,
13 but I understand what you're saying, your Honor. I think that
14 when we have -- this is a very unique case. This isn't like
15 bad things happened in the course of the conspiracy. This is
16 like two separate cases in one here. You have the drug case
17 and then you have the sex trafficking case.

18 THE COURT: But they're not totally separate cases
19 because the government's theory is that the sex trafficking was
20 used to facilitate the drug conspiracy, right? It's not like
21 he was charged with stealing mail and drug conspiracy. Those
22 are totally separate crimes, right?

23 MR. AMBERG: Well, I --

24 THE COURT: Here, the government's theory is that
25 both crimes worked hand in glove, right? That's the theory

1 just like beating up the drug purchaser who doesn't pay his
2 drug debts would be conduct that's related. So these two
3 episodes are not really distinct episodes although they're
4 legally distinct in some ways, but there's an overall,
5 overarching connection between the two kinds of charges, right?

6 MR. AMBERG: But if you look at it from the other
7 point of view, let's say it's a drug conspiracy and there's a
8 murder that's charged as part of the drug conspiracy and then
9 the person gets acquitted of the murder, right? I think
10 McClinton, that that's sort of the issues there. Then at the
11 sentencing whether that was the prosecutor or the government,
12 I'm not sure which it was, but the prosecutor gets up and goes
13 oh, this is a murder here, Judge, you should give him the,
14 sentence him like he killed this guy even though the jury
15 acquitted him of it. I mean, there's a fine line between the
16 general sidle things that can happen in the course of a drug
17 conspiracy versus using very specific conduct and allegations
18 that have been either acquitted or dismissed at the behest of
19 the government after a trial, so I think that it's more, this
20 is more of the guy gets acquitted of murder, but we're going to
21 use the murder against him at sentencing kind of situation.

22 THE COURT: All right.

23 MR. ROTH: Your Honor, real just a correction to what
24 Mr. Amberg said. The Court found by a preponderance of the
25 evidence that McClinton was responsible for the death and it

1 changed the offense variable from 23 to 43. So this is in the
2 context of using acquitted conduct when engaging in a
3 guidelines analysis and ultimately an offense level 20 points,
4 20 levels higher. We're not talking about that in this case.
5 We're talking about allocution, so I wanted to make it clear
6 that the context of McClinton is you're using an acquitted
7 charge to raise the offense variable 20 levels. We're saying
8 we're using the conduct as the Court noted that's connected to
9 the drug conspiracy to argue for a sentence that we're asking
10 for, but I just wanted to make that distinction.

11 THE COURT: All right, look. I think we're going to
12 need some more briefing on the first two issues that we're
13 talking about regarding the prior convictions and the 15-year
14 matter and the drug quantities and I'm hearing some objection
15 from the defense that the government has waived this issue and
16 I don't want to try to resolve that without giving everybody a
17 chance to put in writing exactly what they want me do and what
18 I should rely on and at the same time I think with our last
19 discussion here regarding conduct for which the jury did not
20 reach a verdict and the charges were then later dismissed. I'd
21 like you if you want to give me anything further on that
22 subject, the government's treatment of that was fairly brief
23 and I'm not saying that was inappropriate, but if you want to
24 take an opportunity to elaborate on that, both sides can feel
25 free to use this opportunity to do that. So we're going to

1 have to adjourn the sentencing. Let me get a time frame for
2 you, hold on.

3 (Pause)

4 THE COURT: All right. Let me ask the attorneys how
5 much time would you need to file supplemental sentencing
6 memoranda?

7 MR. AMBERG: Your Honor, umm, I'm in the middle of a
8 lengthy complex trial right now. I know Mr. Hatlem and I
9 project probably about three more weeks maybe before and then I
10 know it's only going to get crazier because the last couple of
11 weeks are really where my client is the center stage so I'm not
12 going to have any time until probably after that trial's over,
13 maybe a month and-a-half?

14 THE COURT: You're talking about getting something
15 filed by middle of May? Is that what you're talking about?

16 MR. AMBERG: Yes, your Honor.

17 THE COURT: All right. How does the government feel
18 about that?

19 MR. ROTH: Without giving your clerk a coronary heart
20 attack, Judge, umm, there's other sentencings that are waiting
21 for this one to proceed.

22 THE COURT: I know.

23 MR. ROTH: I would represent to the Court that there
24 are two sentencings scheduled next Thursday that I just don't
25 think will be impacted by this sentencing, but the remainder of

1 them may. Mr. -- I know Mr. Amberg and Mr. Hatlem are involved
2 in that case and I would leave the timing of it to the
3 discretion of the Court.

4 MR. AMBERG: And your Honor, also could I make an
5 oral motion for an appointment of a second CJA panel lawyer to
6 help me out with that brief and then potentially even the --

7 THE COURT: Hold on.

8 MR. AMBERG: I apologize.

9 (Pause)

10 THE COURT: All right, so May 15 for your sentencing
11 memos and we can conduct the sentencing on June 10 at 9:00.
12 Would that work for everybody?

13 MR. ROTH: Judge, if I can just look at my calendar
14 real quick, make sure I don't have a conflict?

15 (Pause)

16 MR. ROTH: June 10 works for the government.

17 THE COURT: Mr. Amberg, okay?

18 MR. AMBERG: Yes, your Honor. It works for me as
19 well.

20 THE COURT: All right. Now as far as getting more
21 help, you have to file a written motion because we have to get
22 approval from the Circuit for that, so we need something in
23 writing.

24 MR. AMBERG: Okay. I recently did it with Judge
25 Friedman where I just orally asked for a second lawyer and he

1 granted it, but I agree. What I'll do your Honor is just so
2 you know what I'm going to do, I'll file a motion requesting --
3 I already spoke with another CJA panel lawyer that I thought
4 would be perfect to help write this brief, somebody who's --
5 Mr. Machasic, you've probably met him, he's very experienced in
6 complex cases. I'll call Mr. Carter as well and see and I'll
7 get something to you as soon as I can this week.

8 THE COURT: Okay.

9 MR. ROTH: Judge, if he's going to have somebody else
10 write it for him, can we move up, we'd move the dates or are we
11 going to keep the dates the same?

12 MR. AMBERG: Even with that, your Honor, it's going
13 take time. I mean and I'm thinking more ahead, too, for
14 purposes of, once the case is in the Court of Appeals.

15 THE COURT: Well, we don't know what the Court of
16 Appeals is going to do with a request like this so I'm going to
17 keep it just as is. We'll have the sentencing memos due May 15
18 and we'll have the sentencing June 10, 9:00 a.m. Put
19 everything in there that you think I need to know and as far as
20 MDOC goes, this would be an opportunity to see whatever
21 additional information, if any, is available from MDOC
22 regarding the prior convictions and when those sentences were
23 completed. Anything else? For the government?

24 MR. ROTH: Nothing else from the government, your
25 Honor.

1 THE COURT: Mr. Amberg, anything?

2 MR. AMBERG: No, your Honor.

3 THE COURT: All right. My thanks to Mr. Yarbrough,
4 Ms. Sandusky, Ms. Lorenc for their assistance this afternoon.
5 Thank you.

6 (Hearing adjourned at 4:41 p.m.)

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C E R T I F I C A T E

I, David B. Yarbrough, Official Court
Reporter, do hereby certify that the foregoing pages
comprise a true and accurate transcript of the
proceedings taken by me in this matter on Monday, April
1st, 2024.

5/13/2024

Date

/s/ David B. Yarbrough

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